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Supreme Court of the United States.

OCTOBER TERM, 1892.

Term No., 1305.

EX PARTE:

IN THE MATTER OF ALBERT FREDERICH,

PETITIONER, *Appellant.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

"Arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism."

Federalist No. 83.

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Supreme Court of the United States.

EX PARTE: IN THE MATTER OF ALBERT FREDERICH, APPELLANT.

Appeal from the Order of the Circuit Court of the United States for the District of Washington Denying an Application for a Writ of Habeas Corpus.

STATEMENT OF CASE.

Frederich, the appellant, was duly indicted by the grand jury of King county, Washington, and upon said indictment was arraigned, pleaded not guilty, was tried by a jury, found guilty of murder in the first degree, and sentenced to death.

From the judgment of the court imposing said death sentence he appealed to the supreme court of the State, alleging errors in procedure and want of evidence to support the verdict.

Upon hearing such appeal the appellate tribunal found that the verdict of murder in the first degree was not supported by the evidence in that the essential element of "deliberate and premeditated malice" was lacking, and therefore ordered "that the judgment of death be set aside "and vacated, but that the verdict of the jury stand and the "cause be remanded to the superior court of King county,

"with instructions to enter a new judgment of murder in "the second degree against the appellant and proceed thereon "in accordance with law."

29 Pacific Rep., 1055, 1061.

Pursuant to said order Frederich was again brought before the bar of the superior court of King county, was informed of the nature of the indictment found against him and of the verdict of the jury finding him guilty of murder in the first degree, and also of the order of the appellate court directing that said verdict should stand and the entering against him of a judgment as for murder in the second degree. (Record, p. 2.)

And thereupon said court, without further delay or trial and without the further intervention of a jury, entered the following judgment:

"It is therefore considered, ordered, and adjudged by the court that the said Albert Frederich is guilty of the crime of murder in the second degree, and that he be punished by confinement at hard labor in the penitentiary of the State of Washington for the term of twenty (20) years." (Record, p. 3.)

Pursuant to said order he was committed to the custody of "the warden and officers in charge of the penitentiary of the State of Washington," where he is now confined. (Record, p. 4.)

The argument is that the appellant is deprived of his liberty in violation of the fourteenth amendment of the Federal Constitution, the judgment by virtue of which he is confined being void because opposed to "due process of law."

Provisions of the State Constitution Bearing on the Discussion.

ART. 1, SEC. 2. "The Constitution of the United States is the supreme law of the land."

ART. 1, SEC. 3. "No person shall be deprived of life, liberty, or property without due process of law."

ART. 1, SEC. 21. "The right of trial by jury shall remain inviolate."

ART. 1, SEC. 22. "In criminal prosecutions the accused shall have the right to * * * a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed."

Provisions of the Code of Procedure Bearing upon the Discussion.

Hill's Statutes and Codes, vol. 2:

SEC. 1291. "If, on the arraignment of any person, he shall plead guilty, if the offense charged be not murder, the court shall, in its discretion, hear testimony and determine the amount and kind of punishment to be inflicted; but if the defendant plead guilty to a charge of murder, a jury shall be empanneled to hear testimony, and determine the degree of murder and the punishment therefor."

SEC. 1364. "No person indicted or informed against for an offense shall be convicted thereof unless by confession of his guilt in open court, or by the verdict of a jury accepted and recorded in open court."

SEC. 1367. "No person charged with any offense against the law shall be punished for such offense unless he shall have been duly and legally convicted thereof in a court having competent jurisdiction of the case and of the person."

Supreme court of State, appeals to:

SEC. 1429. "The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings." * * *

Penal code:

SEC. 1. "Every person who shall purposely and of deliberate malice * * * kill another, shall be deemed guilty of murder in the first degree and upon conviction shall suffer death. But this shall in no case prevent the exercise of the pardoning power of the governor or the authority to commute the punishment of death to imprisonment for life."

SEC. 3. "Every person who shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree, and upon conviction thereof shall be imprisoned in the penitentiary for a term not less than ten nor more than twenty years and kept at hard labor."

FIRST.

Jurisdiction.

It being alleged under oath that Frederich is restrained of his liberty in violation of the fourteenth amendment, the circuit court, by the express words of the statute in such case provided, had jurisdiction to inquire into the cause of the restraint and to deal with the prisoner "as law and justice require."

Rev. Stats. U. S., secs. 751, 752, 753, 754, 755, and 761.

That the imprisonment is the result of the exercise of State authority acting through its judicial agents does not affect the jurisdiction of the circuit court to make inquiry in the premises, nor does it lessen its power to discharge the prisoner upon a proper showing, and this, no matter whether the aid of the circuit court be invoked prior to the trial in the State court or subsequent to trial and conviction.

Ex parte Royall (No. 2), 117 U. S., 241.
Cunningham *vs.* Neagle, 135 U. S., 1.

Under existing statutes of the United States the right of the petitioner to prosecute an appeal to this Court from an order of the circuit court denying his application for a writ of *habeas corpus* cannot reasonably be questioned.

Rev. Stats. U. S., sec. 764, as amended March 3, 1885, (23 Stats. L., 437; sup. 2d E., p. 485).

Jugiro *v.* Brush, warden, &c., 140 U. S., 291.

While it may be taken as settled that after final disposition of a case in the highest court of a State the Federal courts may, in the exercise of discretion, put the party who has been denied a right, privilege, or immunity claimed under the Constitution of the United States to his writ of error from this Court rather than interfere by *habeas corpus*,

Ex parte Wood, 140 U. S., 278,

it nevertheless has the power, if it see fit so to do, to proceed summarily by *habeas corpus* to determine whether the petitioner is illegally restrained as alleged.

Ex parte Royall, *supra.*

Upon an application for the issuance of a writ of *habeas corpus*, notwithstanding the petitioner may be able to proceed by writ of error, if it appear that the process by virtue of which he is detained be not merely erroneous but is absolutely void, *habeas corpus* will lie and the writ should be issued *instanter* by any court or judge vested with jurisdiction,

Ex parte Bridges, 2 Woods, 428;
Ex parte Lange, 18 Wall., 163,

for proceedings by writ of error cannot afford that speedy relief which flows from *habeas corpus* and to which one illegally imprisoned is entitled.

"Being invested with plenary jurisdiction for the prisoner's protection, to fail to exert the power from an overscrupulous regard for the course of procedure in the State courts would be as timorous as it would be indefensible."

Ex parte Ulrich, 42 Fed. Rep., 587, 598.

Upon writ of error to give this Court jurisdiction, it must affirmatively appear on the face of the record not only that a Federal question was RAISED in the State courts, but that it was DECIDED or that its decision was necessary to the judgment or decree rendered,

Chouteau *vs.* Gibson, 111 U. S., 200.

and it will not do that such question was raised for the first time on motion for rehearing or review.

T. & P. R'y Co. *vs.* So. Pac. R'y Co., 137 U. S., 48.

If it be true, as is stated in the opinion of the learned circuit judge (Record, p. 8), that no Federal question has yet been passed upon in this case by the State supreme court, it would hardly be in keeping with the principles of good practice and procedure to insist that Frederich should hew out a new and circuitous pathway to this tribunal, when a direct and simple road is already open to him.

But it is not true that the validity of the judgment imposed upon the appellant by the superior court of King county is open to further investigation upon appeal to the supreme court of the State. The action of the county court is in precise accord with the mandate of the State supreme court. Its judgment is in effect the judgment of the supreme court. The State supreme court must be presumed to have acted only after due consideration, and an appeal from a judgment entered pursuant to its mandate would be but an appeal from itself to itself. Such an appeal would be but a prayer in vain, and the doing of a vain thing is never insisted upon by the law.

That the State supreme court adhered to its original decision, notwithstanding a motion for a rehearing, but serves to strengthen this suggestion.

This Court has established the rule governing the consideration of appeals or writs of error from the judgments or

decrees of inferior courts entered pursuant to its mandates in the following words:

"An appeal will not be entertained by this Court from a decree entered in a circuit court or other inferior court in exact accordance with our mandate upon a previous appeal. Such a decree when entered is in effect our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the decree entered, and, if it conforms to the mandate, dismiss the case with costs."

Stewart *vs.* Salamon, 97 U. S., 361.
Humphrey *vs.* Baker, 103 *ib.*, 736.
Mackall *vs.* Richards, 116 *ib.*, 45.

The propriety of such practice cannot be questioned.

Apply the principle to the case at bar, in the event of a further appeal from the judgment of the superior court of King county, by virtue of which the prisoner is now held in custody, and a dismissal of the appeal would be the only result.

It appears therefore that the prisoner's application is not only justified on the grounds of right practice and simplicity, but it is to be further defended upon the ground that in the present state of the record in the State courts it is the sole method by which he may invoke the aid of the Federal Constitution in the maintenance of his fundamental rights.

SECOND.

The sentence under which Frederich is restrained of his liberty is void for want of jurisdiction in the trial court to impose it.

Jurisdiction on the part of a court to impose a particular sentence is equally as essential to its validity as jurisdiction of the person or the subject-matter. If any one of these essentials is lacking the sentence is a nullity and without legal strength.

In imposing sentence a court has precisely the jurisdiction granted to it by statute and none other. As a general rule it cannot exceed the maximum or undercut the minimum. If in some States it be held not absolutely illegal to vary from the statute in *degree* it is certain nevertheless that there cannot be the slightest variance in *kind*. Such variance would be like imposing a penance, or a journey to Rome.

"It is no answer to say that the court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may otherwise be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would be simply void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction, on an indictment for libel, render a judgment of death or confiscation of property, it would for the same reason be void. Or if, on an indictment for treason, the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property which should by the judgment of the court be confiscated to the State, it would be void as to the attainder

because in excess of the authority of the court and forbidden by the Constitution."

Ex parte Lange, 18 Wall., 163, 176.

"It is undoubtedly the general rule that a judgment rendered by a court in a criminal case must conform strictly to the statute, and that any variation from its provisions either in the *character* or the extent of punishment inflicted renders the judgment absolutely void."

Graham *vs.* Weeks, 138 U. S., 461.

The defendant in a criminal case is entitled upon conviction to have meted out to him the precise punishment which the law provides and no other. A different punishment cannot be substituted on the ground of its being less in severity, *e. g.*, sentence to transportation or imprisonment for a capital offense would be void, and upon proper proceedings the convict should be discharged.

Bourne *vs.* The King, 7 Ad. & Ellis, 58.

The judgment must follow the verdict and be supported by it. If the verdict is wrong the remedy is by a new trial.

Buck *vs.* Little, 24 Miss., 463.
Reed *vs.* Dunklin, 5 Ala., 205.
Mitchell *vs.* Gersendorf, 44 Ind., 358.
Black on Judgments, vol. 1, §§ 142, 186.

If the superior court of King county did not have jurisdiction under the State laws upon a verdict of murder in the first degree to impose any sentence other than that of death, then clearly the judgment and sentence of imprisonment in the penitentiary for twenty years imposed upon Frederich are void and may be attacked collaterally in the Federal courts by *habeas corpus*.

Ex parte Nielson, 131 U. S., 176.
Ex parte Royall (*supra*).

It matters not that the highest court of the State by its decision has sanctioned the sentence in question.

When the practical operation of such a decision results in an unlawful discrimination amongst persons who are or may be charged with the same degree of crime and thereby denies to each one of the class the equal protection of the laws, or when it leads to the imposition of punishment otherwise than in the "due process of law," then it is open to the circuit court in the first instance and to this court on appeal to review such decision on an application for a writ of *habeas corpus*, and, if the c ause be made out, to discharge the prisoner.

Yick Wo and Wo Lee *vs.* Hopkins, sheriff, 118 U. S., 536, 566.

While as a general rule the decisions of the supreme court of a State construing its own statutes and municipal regulations will be adopted and followed by this court, nevertheless "there have been heretofore in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We (this court) shall never immolate truth, justice, and law because a State tribunal has erected the altar and decreed the sacrifice."

Gelpcke *vs.* Dubuque, 1 Wall., 175, 206.

"The fourteenth amendment in declaring that no State 'shall deprive any person of life, liberty, or property without due process nor deny to any person within its jurisdiction the equal protection of the laws' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; * * * and that in the administration of criminal justice no *different* or *higher punishment should be imposed upon one than such as is prescribed to all for like offenses.*"

Barbier *vs.* Connolly, 113 U. S., 27.
In re Converse, 137 U. S., 624.

If in the administration of the criminal laws a punishment be imposed upon an individual DIFFERENT from that which is prescribed by the law for criminals of his class generally it is plain that such punishment falls within the constitutional prohibition.

An unconstitutional conviction and punishment under a valid law is as much a violation of a person's constitutional rights as a conviction and punishment under an invalid law.

It will not do to say that the arbitrary action of the State judge in such a case is not the action of the *State*, and hence not within the purview of the amendment.

A State can act only through its legislative, executive, or judicial agents, and—

"The prohibitions of the fourteenth amendment extend to all action of the State denying equal protection of the laws, whether it be by one of these agencies or another."

Ex parte Virginia, 100 U. S., 313.

"It is hardly necessary to say that the protection of the fourteenth amendment restricting the power of the State applies equally to the action of a State judge. It has reference to the actions of the political body denominated a *State* by whatever instruments or in whatever modes that action may be taken. The State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision must mean that no agency of the State or of the officers or agents by whom its powers are exercised shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of public position under a State government deprives another of property, life, or liberty without due process of law or denies or takes away the equal protection of the laws violates the constitutional inhibition, and, as he acts only in the name of the State and under the power of the State, his act must be the act of the State. This must be so or the constitutional prohibition has no meaning and is without force or effect

whenever a State has clothed one of its agents with power to annul or evade it."

Ex parte Ulrich, 42 Fed. Rep., 587, 597.
Ex parte Ah Lee, 5 Fed. Rep., 902.

This constitutional inhibition then bears directly upon the administration of the State laws by the State tribunals, and when it is alleged under oath by an aggrieved party that undue and unlawful discrimination is being made in the administration of such laws by the State courts, it is the right and duty of the Federal courts to hear his complaint, and, if found to be well founded, to redress his grievances.

Yick Wo *vs.* Hopkins (*supra*).

There has been but one verdict in this case, and that is a verdict of murder in the first degree (Record, p. 2). That verdict has been accepted and entered in open court and still stands unaltered upon the records of the superior court of King county. The sole punishment prescribed by the laws of Washington for such degree of crime is death. (Penal Code, sec. 1.)

Without any authority other than that supposed to be inherent in the State supreme court by virtue of a perverted construction of section 1429 of the Code of Procedure, which merely authorized that court to "affirm, reverse, or modify any *judgment* or order appealed from" and to "direct the proper judgment or order to be entered or direct a new trial or further proceedings," a punishment not known to the statute under which conviction was had has been imposed upon the appellant. The imposition of such punishment clearly results in the case at bar in an unlawful discrimination; it denies that equal protection of law guaranteed by the Fourteenth amendment.

And again, by imposing a punishment not provided by statute for the degree of crime for which he has been convicted, but which punishment is particularly prescribed for

an offense for which the prisoner has not "been duly and legally convicted," the provisions of section 1367 of the Code of Washington have been violently outraged. The sentence was imposed without reference to that "due process" which the plain letter of the State law makes mandatory in the conduct of all trials for crimes.

Had Frederich pleaded "guilty" upon arraignment the trial court would not have had the power in its discretion to determine for itself the degree of his crime. Section 1291 of the State Code specifically provides that in such case "a jury shall be empaneled to hear the testimony and determine the degree of murder and the punishment therefor."

If the power to determine for itself the degree of murder is denied the trial court upon a plea of "guilty," how can it be presumed to rightfully exercise such power in the infinitely more serious case of a plea to the country?.

The record here discloses the bald case of an "arbitrary punishment upon an arbitrary conviction," which Hamilton was pleased to remark (Federalist, No. 83) have "ever appeared to him to be the great engines of judicial despotism."

THIRD.

It is not lawful for any State, either by legislative enactment or by judicial interpretation, to deprive any person within its jurisdiction, charged with a capital offense, of the right to trial by jury.

We submit that the phrase "due process of law" as used in the Fourteenth amendment of the National Constitution contemplates the intervention of a petit or traverse jury in all *trials* where the defendant is charged with a capital offense. As used it is equivalent to "law of the land" in the 29th

section of Magna Charta. By immemorial usage that phrase has acquired a fixed, definite, and technical meaning. It refers to and includes not only the general principles of public liberty and private right, which lie at the foundation of all free government, but also the very institutions which, venerable by time and custom, have been tried by the experience of past generations of our ancestors prior to emigration to this country and found fit and necessary for the preservation of the principles themselves, and which, being the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State. At first introduced by express declaration into the Constitution of the United States as a limitation upon the powers of the Federal Government, it has since been added as an additional security to the individual against oppression by the States themselves.

Trial by jury either in capital offenses or in minor transgressions of law is not in such words mentioned in the Fourteenth amendment. To what principles, then, must we resort to ascertain whether it be included within the meaning of "due process of law"? Fortunately this Court has heretofore established the rule by which we must be guided in such investigation, as follows:

> "We must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted upon by them after the settlement of this country."
>
> Murray's Lessees *vs.* Improvement Co., 18 How., 272, 276.

Was trial by jury a recognized and established mode of proceeding in trials for capital offenses before the emigration of our ancestors to this country?

According to Blackstone trial by jury has been used time out of mind in the English nation and seems to have been coeval with the first civil government thereof.

It was in use in the earliest Saxon colonies. Mention is made of the institution as early as the laws of King Eldred, and even then not as a new invention.

Duncombe, Trials per Pais, pp. 2, 3.

"The truth seems to be that this tribunal was universally established among all the northern nations and so interwoven in their very constitutions that the earliest accounts of the one give us also traces of the other. Its establishment and use in this island of whatever date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battle, was always so highly valued by the people that no conquest, no change of government, could ever prevail to abolish it. In Magna Charta it is more than once insisted upon as the principal bulwark of our liberties, but especially by chapter 29, that no freeman shall be hurt either in his person or property *nisi per legale judicum parium suorum, vel per legem terrae*, and it was ever esteemed in all countries a privilege of the highest and most beneficial nature."

Blackstone, B'k 3, p. *349.

Edmund Burke in a speech delivered A. D. 1771 (Works, vol. 7, p. 108) declared it to be—

"The very ancient privilege of the people of England that they shall be tried, except in the known exceptions, not by judges appointed by the Crown, but by their own fellow-subjects, the peers of that county court at which they owe their suit and service, and out of this principle the trial by juries has grown. This principle has not, that I can find, been contested in any case by any authority whatever."

It is to be admitted that this right to a jury trial is not so extensive as is popularly and commonly supposed, and that in many cases a person may be deprived of property

Walker *v.* Sauvenet, 92 U. S., 90,

and subjected to hardships and imprisonment (as in case of misdemeanors) without the intervention of a jury, but—

"Never can one be subject to any punishment which would render him infamous and deprive him of his political rights as a citizen without a trial by jury."

Proffatt on Jury Trials, § 105.

The argument and reason for the use of juries in criminal trials are much stronger than in civil causes—

"Since in times of difficulty and danger more is to be apprehended from the partiality of judges appointed by the Crown in suits between the King and the subject than in disputes between one individual and another to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier of a presentment and trial by jury between the liberties of the people and the prerogative of the Crown. * * * But the founders of the English law have with excellent forecast contrived that no man should be called to answer to the King for any capital crime unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury, *and that the truth of every accusation, whether preferred in the shape of an indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his neighbors indifferently chosen and above all suspicion.*

"So that the liberties of England cannot but subsist so long as this PALLADIUM remains sacred and inviolate, not only from open attacks (which none will be so hardy as to make), but also from all secret machinations which may sap and undermine it by introducing new and arbitrary methods of trial by justices of the peace, commissioners, and courts of conscience; and, however convenient these may appear at first (as doubtless all arbitrary powers well executed are the most *convenient*), yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that ALL FREE NATIONS must pay for their liberty in more substantial matters; that such inroads upon this sacred bulwark of the nation are fundamentally opposed to the spirit of our constitution, and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern."

Blackstone's Com., Bk. IV, p. * 347.

In Story on the Constitution, § 1779 *et seq.*, the religion of the jury is stated thus:

"It seems hardly necessary in this place to expatiate upon the antiquity and importance of the trial by jury *in criminal cases*. It was from very early times insisted on by our ancestors in the parent country as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. The right constitutes one of the fundamental articles of Magna Charta in which it is declared that no man shall be arrested, nor imprisoned, nor banished, nor deprived of life, &c., but by the judgment of his peers or by the law of the land. The judgment of his peers here alluded to, and commonly called in the quaint language of former times a trial *per pais*, or trial by the country, is the trial by a jury, who are called the peers of the party accused, being of like condition and equality in the State. When our more immediate ancestors removed to America they brought this great privilege with them as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power.

"The great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers and against a spirit of violence and vindictiveness on the part of the people."

And he declares it is often more important to guard against the latter than the former, for, while the sympathies of all mankind are enlisted against the revenge and fury of a single despot, it is more than difficult "to escape the vengeance of an indignant people roused to hatred by unfounded calumnies or stimulated to cruelty by bitter political enmities or unmeasured jealousies." Under such circumstances the appeal of innocence to a firm and impartial jury sworn to do right and guided solely by legal evidence and a sense of duty is furnished with a "security against the prejudices of judges who may partake of the wishes and opinions of the Government and against the passions of the multitude who may demand their victim with a clamorous

precipitancy. So long, indeed, as this palladium remains sacred and inviolable the liberties of a free government cannot wholly fail."

It would seem, indeed, that there could be no question that at common law as it existed at the time of the colonists the only recognized tribunal for the trial of the guilt of the accused under an indictment for felony and a plea of not guilty was a jury of twelve men.

4 Black. Com., 349.
1 Chitty Crim. Law, 505.
2 Hale's P. C., 161.
Bacon's Abrid., tit. Juries, A.
2 Bennett & Heard's Lead. Cas., 327.

To like effect are the following cases:

Work *vs.* State, 2 Ohio St., 296 (59 Am. Dec., 671).
Inhab. of Saco *vs.* Wentworth, 37 Maine, 165 (58 Am. Dec., 786, 789).
Harris *vs.* People, 128 Ills., 585 (15 Am. St. R., 153, 154).

And so jealously is this palladium guarded that the right to waive a jury upon a plea of not guilty has been denied.

Lord Dacres' case, Kelyng's R., 59.
Lord Audley's case, Woodeson's Lect., vol. 1, 346.

And it is settled that it cannot be done in this country in such case save with the consent of the State as well as the prisoner.

State *vs.* Mead, 4 Blackford, 309 (30 Am. Dec., 661).
See Cancemi *vs.* State, 18 N. Y., 128, 135.

And it has been ruled more than once that so inherent was the right in all persons living under a free and enlightened government that it could not be abridged by law.

Wynchamer *vs.* People, 13 N. Y., 378.
Hill *vs.* People, 20 N. Y., 363.
Jones *vs.* Robbins, 8 Gray, 342.

So it appears, we think, upon indispu table authority, that ever since Magna Charta at least, the right to a trial by jury has been esteemed a peculiarly dear and inestimable privilege by the English race, and whether from a strictly historical point of view the right was first defined and secured by that instrument or not it was nevertheless invariably appealed to and implicitly relied on as unalterably and inviolably securing such right among the other valuable privileges guaranteed therein. The English colonists settled here with a deep-rooted regard for the right, and in every enumeration of their privileges and immunities it takes a conspicuous place.

Can it be shown from the actions of the colonists, our immediate ancestors, after they set foot on American soil, that trial by jury "was unsuited to their civil and political condition"? Did they ever waver for an instant in asserting it as their birthright? Clearly not.

The inhabitants of the colonies of Plymouth and Massachusetts, in their very infancy, declared that they had brought with them into this country the "privileges of English freemen," and in the year 1692, on the receipt of their new charter, they reasserted that the *right of trial by jury and the necessity of due proof preceding conviction were rights undeniable.*

Hazard's St. Papers, vol. 1, pp. 408, 487, ed. Phila., 1792.

See also 2 Kent's Com., p. 2 *et seq.* and elaborate note.

In the Congress of the Colonies held in New York in 1765 it was declared that the colonists were entitled to all the essential rights, privileges, and immunities confirmed by Magna Charta to the subjects of Great Britain.

Hutchinson's Hist. Mass. Bay, App'x F.

Lord Chatham, in his well-known speech on the doctrine of taxation without representation, stoutly maintained that the inhabitants of the colonies were entitled to all the peculiar privileges of Englishmen; that they were equally bound by the laws and equally entitled to participate in the constitution of England.

In the memorable declaration of rights of the first Continental Congress in October, 1774, whereat all the colonies except Georgia were represented, it was declared "that the inhabitants of the English colonies in North America *by the immutable laws of nature*, the principles of the English constitution and their several charters and compacts, * * * were entitled to the common law of England, AND MORE ESPECIALLY TO THE GREAT AND INESTIMABLE PRIVILEGE OF BEING TRIED BY THEIR PEERS OF THE VICINAGE, ACCORDING TO THE COURSE OF THAT LAW."

1 Journal of Congress, 27–29.

The fact that the King of England had endeavored in many cases to deprive these colonists of "the benefits of trial by jury" was spread before the world as one of the grounds for declaring their independence and severing all ties with the mother country.

The declaration of the right was subsequently emphasized in a most imposing manner by its incorporation into the earlier constitutions of the original States.

Maryland, North Carolina, and Virginia in 1776, South Carolina in 1778, Massachusetts in 1780, New Hampshire in 1784, and Delaware in 1792, all insisted upon the right as inherent in unmeasured terms.

The great ordinance of 1787 for the government of the territory of the United States northwest of the Ohio river, the provisions of which were (sec. 14) "ordained and de-

clared should be considered as articles of compact between the original States and the people and States in the said territory, to forever remain unalterable unless by common consent," set forth that "the inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus* and of the trial by jury," and that no man shall be deprived of his liberty or property but by the judgment of his peers or the law of the land."

The specific right was further declared in the original Constitution of the United States (art. 3, sec. 2) and subsequently enlarged and more emphatically stated in amendments Five and Six.

And the constitution of every State in the Union to-day or the laws made in pursuance thereof provide in language unmistakable for the intervention of a jury in all cases of capital or infamous crimes where the proceeding is by indictment or information.

How well have the people of this country recognized the fact that the jury trial is "the best guardian of both public and private liberty which has been hitherto devised by the ingenuity of man!" Madison never spoke words more true or weighty than when he declared the jury trial "as essential to secure the liberty of the people as any one of the pre-existent rights of nature."

1 Lloyd's Deb., 430.

The case of *Hurtado* vs. *California* (110 U. S., 516), which denied the necessity of indictment by grand jury as a condition precedent to a trial for infamous offenses, seems to have turned upon the fact that such mode of procedure was not absolutely essential at common law, and that it is to "the forensic trial under a broad and general law operating equally upon every member of the community" that the words "by the law of the land in Magna Charta and in every subsequent declaration of rights" apply (p. 526).

It may be true as was said in *Munn* vs. *Illinois* (94 U. S.,

113–134) and repeated in *Hurtado* vs. *California* that "a person has no property, no vested interest in any rule of the common law," but it has never been doubted, save perhaps since the rendition of the decision last cited, that the right of trial by jury in cases of felony was fortified in the organic law against the power of attack; and even now it requires great hardihood to contemplate with any degree of countenance any suggestion to the contrary.

"All persons (not attached to the army or the navy or the militia in active service), where the courts are open, if charged with crime, are guaranteed the inestimable privilege of a trial by jury. This privilege is a vital principle underlying the whole administration of criminal justice. It is not held by sufferance and cannot be frittered away on any plea of State or political necessity."

And, although this language was used by this Court in a case (*Ex parte* Milligan, 4 Wall., 2 *et seq.*) arising under the Fifth amendment, it is equally as applicable to cases arising under the fourteenth.

FOURTH.

Upon an application for the writ of habeas corpus the sole question open for consideration is as to the illegality of the restraint. The guilt or innocence of the applicant cuts no figure.

If it appear that the appellant is illegally restrained of his liberty by the authority of the commitment issued by the superior court of King county, he is entitled to his discharge without delay. If this were a writ of error to the supreme court of the State, it might possibly be the duty of the court to remand the case for further proceedings.

Kring's case, 107 U. S., 221.

But under the writ of *habeas corpus* the court can do nothing else than discharge a prisoner from wrongful confinement in the penitentiary under an illegal sentence,

Medley's case, 134 U. S., 160;

and this discharge should be without conditions, for it can be no more lawful to detain the prisoner ten days for the purpose of giving notice to the State officers of his intended release than to detain him for ten years, thereby virtually subjecting him to the completion of the illegal sentence.

S. F. PHILLIPS,
F. D. MCKENNEY,
For the Appellant.

149 U.S. 870

RECORD, CASE NO. 15275.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 1305.

EX PARTE: IN THE MATTER OF ALBERT FREDERICH, APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

FILED MARCH 13, 1893.

RECORD, CASE NO. 15275.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 1305.

EX PARTE: IN THE MATTER OF ALBERT FREDERICH, APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

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a UNITED STATES CIRCUIT COURT, DISTRICT OF WASHINGTON, NORTHERN DIVISION, NINTH CIRCUIT.

In the matter of the application of Albert Frederich for a writ of habeas corpus.

TRANSCRIPT.

1 *To the honorable the circuit court of the United States, district of Washington, Northern Division.*

In the matter of the application of Albert Frederich for a writ of habeas corpus.

The complaint of Albert Frederich respectfully shows that he is now a prisoner confined in the State penitentiary of the State of Washington, at Wallawalla, in the said State, in the custody of , warden of said penitentiary.

That his imprisonment is by virtue of a warrant and judgment, a copy of which is hereto attached and marked Exhibit A and B, and not otherwise, and that this complainant is informed by his counsel, Messrs. Tyler & Tyler, and verily believes, that his imprisonment is illegal and that such illegality consists in this, to wit:

That complainant was duly indicted by the grand jury of King County, State of Washington, on the 17th day of July, 1891, for the murder of one Julius Scherbring, and upon said indictment he was duly arraigned, pleaded not guilty, was tried by a jury, who found him guilty of murder in the first degree, on the 26th day of September, 1891.

That complainant moved said court for a new trial, which was denied, and thereupon said court sentenced this complainant to be hung.

That thereupon this complainant appealed to the supreme court of said State from said judgment and from the order of said court denying him a new trial.

That upon said appeal such proceedings were had in said supreme court that said court reversed, annulled, and set aside the said judgment
2 and remanded said cause to the superior court with instructions to the said court to sentence this complainant without any other trial or verdict of a jury, as for murder in the second degree.

That on the 16th day of June, 1892, this complainant, was brought before said superior court, adjudged to be guilty of murder in the second degree by said court, by direction of said supreme court, and sentenced to imprisonment in the State penitentiary of the State of Washington for the term of twenty years.

That complainant is advised by his counsel, and verily believes, that he has been since the 16th day of June, 1892, and is now deprived of his liberty without due process of law, in violation of the XIV Amendment to the Constitution of the United States.

Wherefore your complainant prays that a writ of habeas corpus may issue from this honorable court commanding the said , warden of the State penitentiary of Washington, to have the body of your complainant before this honorable court at such time as to the court shall seem

meet. That this honorable court adjudge the imprisonment of your complainant to be illegal and direct him to be discharged, and your complainant as in duty bound will ever pray, etc.

ALBERT FRIEDRICH,
Complainant.

STATE OF WASHINGTON,
County of Wallawalla:

Albert Friederich, being duly sworn, deposes and says: That he has read the foregoing complaint, knows the contents thereof, and the same is true of his own knowledge.

ALBERT FRIEDRICH.

3 Subscribed and sworn to before me this 15 day of July, 1892.
[SEAL.] J. G. THOMAS,
Notary Public in and for the State of Washington, residing at Wallawalla.

EXHIBIT A.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR THE COUNTY OF KING.

THE STATE OF WASHINGTON, PLAINTIFF,
vs.
ALBERT FRIEDERICH, DEFENDANT. } No. 370.

Convicted of murder in the first degree; altered by supreme court, upon appeal, to murder in the second degree.

The prosecuting attorney, with the defendant and counsel, came into court. The defendant, Albert Freiderich, was duly informed by the court of the nature of the indictment found against him for the crime of murder in the first degree, committed on the 14th day of July, 1887, of his arraignment and plea of not guilty of the offense charged in the indictment, of his trial, and the verdict of the jury on the 26th day of September, 1891, "guilty as charged in the indictment."

That after said verdict had been received and judgment of death passed thereon in accordance with law, an appeal was presented to the supreme court of the State of Washington, which court, after due reflection, consideration, and examination of the said case, directed the judgment of death rendered in this court be set aside and vacated, but that the verdict of the jury stand and this court enter and render a new judgment of guilty of murder in the second degree.

Therefore this court, proceeding under the order of the said su-
4 preme court as in said opinion directed, this day informs the said Albert Friederichs of the opinion and conclusion of said superior court in said case, and allowing the said verdict so to stand, this the superior court of the State of Washington, for King County, and adjudges and decrees that the said Albert Frederich is guilty of the crime of murder in the second decree.

The defendant, Albert Friederich, was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replies he has none. And no sufficient cause being shown

or appearing to the court, thereupon the court rendered its said judgment as follows: That whereas the said Albert Frederich having been duly convicted in this court of the crime of murder in the first degree,

And judgment of death rendered thereon: That thereafter the said Albert Frederich prosecuted an appeal to the supreme court of the said State of Washington, which said supreme court, after due deliberation, examination, and reflection of the record of said case, directs this court that the judgment of death rendered by this court be set aside and vacated; that the verdict of the jury stand; that the court this day render a new judgment of guilty of murder in the second degree.

It is therefore considered, ordered, and adjudged by the court that the said Albert Frederich is guilty of the crime of murder in the second degree, and that he be punished by confinement at hard labor in the penitentiary of the State of Washington for the term of twenty (20) years, and that he pay the costs of this prosecution.

The defendant, Albert Frederich, was then remanded to the custody of the sheriff of said county, to be by him delivered into the custody of the proper officers of the said penitentiary.

OFFICE OF THE COUNTY CLERK OF KING COUNTY,
State of Washington:

I, W. B. Spencer, county clerk and ex-officio clerk of the superior court of the State of Washington, for the county of King, do hereby certify the foregoing to be a true and correct copy of the judgment duly made, entered on the minutes of the said superior court in the above-entitled action, and that I have compared the same with the original; that the same is a correct transcript therefrom and of the whole thereof.

Attest my hand and the seal of the said superior court this 17th day of June, 1892.

[SEAL.] W. B. SPENCER,
Clerk.

EXHIBIT B.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THE COUNTY OF KING.

The State of Washington to the sheriff of King County and the warden and officers in charge at the penitentiary of the State of Washington, greeting:

Whereas, Albert Frederich having been duly convicted in the superior court of the State of Washington for the county of King, of the crime of murder, and judgment having been pronounced against him that he be punished by confinement at hard labor in the penitentiary of the State of Washington, for the term of twenty (20) years and pay the costs of this prosecution, all of which appears to us of record, and a certified copy of the judgment being endorsed thereon and made a part hereof;

Now this is to command you, the said sheriff of King County, to take and keep and safely deliver the said Albert Frederich into the custody of the said warden, or other officer in charge of the penitentiary of the State of Washington at your earliest convenience.

And this is to command you, the said warden and other officers in charge of the penitentiary of the State of Washington, to receive
6 of and from the sheriff of King County the said Albert Frederich, convicted and sentenced as aforesaid, and he, the said Albert Frederich, keep and confine in the said penitentiary for the term of twenty (20) years, and these presents shall be authority for the same. Herein fail not.

Witness Hon. T. J. Humes, judge of the said superior court, this 17th day of June, A. D. 1892.

Attest my hand and the seal of said superior court the day and year last above written.

W. B. SPENCER,
Clerk.

(Endorsed:) Filed August 9, 1892, in the U. S. circuit court. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

7 IN THE UNITED STATES CIRCUIT COURT, DISTRICT OF WASHINGTON, NORTHERN DIVISION.

In the matter of the application of Albert Frederich for a writ of habeas corpus.

And now, on this 9th day of August, 1892, this cause having been heretofore heard and submitted to the court upon the petition of the petitioner, and the court having duly considered said petition and the argument of the respective counsel, and being now sufficiently advised in the premises, it is ordered that said petition be, and the same is hereby, denied.

C. H. HANFORD,
Judge.

8 UNITED STATES CIRCUIT COURT, DISTRICT OF WASHINGTON, NORTHERN DIVISION.

In re Friederich. Opinion filed August 9, 1892. Habeas corpus. Application for writ refused.

W. B. Tyler, attorney for petitioner.
James A. Haight, a-st. atty. general for the State.

HANFORD, J:

Albert Friederich petitions for a writ of habeas corpus on the following grounds: A valid indictment, charging him with the crime of murder in the first degree, was found by a lawful grand jury and duly presented to the superior court of the State of Washington for the county of King; after arraignment and a plea of not guilty he was, upon said indictment, tried in said court with the result that the jury brought a verdict finding him guilty as charged in the indictment. He was thereupon sentenced to suffer the legal penalty for said crime, which is death. Upon a review of his case the supreme court of the State considered the evidence insufficient to warrant a conviction of the crime of murder in the first degree and on that ground reversed the judgment of the superior court, but instead of setting the verdict aside or ordering the superior court to do so, the supreme

court ordered that said verdict stand and remanded the case to the superior court with instructions to enter a new judgment against the petitioner adjudging him to be guilty of murder in the second degree and to proceed therein in accordance with law. In obedience to such instructions the superior court did adjudge the petitioner to be guilty of murder in the second degree and sentenced him therefor to be punished by imprisonment at hard labor in the State penitentiary for a period of twenty years, and in pursuance of that sentence he is now incarcerated in said penitentiary.

9 The petitioner claims that this last judgment is not merely voidable because erroneous or irregular, but that upon the face of the record it is manifestly void, and therefore his present imprisonment is without due process of law and in violation of the fourteenth amendment of the Constitution of the United States. The State has appeared by the assistant attorney-general and, while admitting the facts above recited, resists the application, denying that this court has any jurisdiction or authority to order the release of the petitioner from custody, and denying the unlawfulness of his imprisonment.

No person charged with an offense against the laws of this State can be punished for such offense unless he shall have been duly and legally convicted thereof in a court of competent jurisdiction; and no person indicted for an offense can be convicted thereof otherwise than by confession of his guilt in open court, or by the verdict of a jury accepted and recorded in open court; 2 Hill's Code, §§ 1369, 1364. In a case wherein a person is accused of a crime like that of murder in the first degree, which necessarily includes other crimes of lesser magnitude, a question as to the grade of the offense or degree of guilt must necessarily arise whenever the accused shall have been found to have committed the guilty act charged. This subordinate question is one of mixed law and fact. Obviously therefore it is for the jury to decide. An indictment is sufficient to support a judgment for any grade of offense necessarily included within the principal crime charged. The office of an indictment, however, is to raise an issue, a pleading which clearly and distinctly alleges all the facts essential to constitute the lesser offenses included within the highest, suffices to tender an issue as to each fact and as to each offense, but a plea of guilty or a verdict in a cause is determinative and to be of any virtue or validity must be certain and actually decisive of every question in issue.

10 A verdict which lacks the quality of certainty will not support a judgment (Hayne on New Trial and Appeal, page 706, § 235; Meeker vs. Gardella, 1 Wash. St., 148; Western Mill Co. vs. Blanchard, ib. 234). A verdict, or plea of guilty of murder in the first degree, and guilty of murder in the second degree, and guilty of each lesser included crime, down to simple assault, if such a thing can be imagined, could not serve to guide, much less control, the court in rendering the final judgment. The judgment in a case wherein such a verdict or plea had been received, whether inflicting as punishment a merely nominal fine, imprisonment, or the death penalty, would not be founded upon the plea or finding of a jury, but upon the opinion of the judge as to the facts of the case disclosed by the evidence. Now, as shown by the above references to the code, the laws of this State do not admit of a judgment in a criminal case adverse to the defendant upon any such a basis. A plea or verdict of guilty of a

particular crime is in every case an indispensable prerequisite to the infliction of punishment under color of law for any crime cognizable in the courts of record of this State.

The petitioner has not by a voluntary plea or confession in open court authorized the superior court to render any judgment against him.

But one verdict has been returned, that is a general verdict, the legal meaning and effect of which is to declare the petitioner guilty of the crime of murder in the first degree. (People vs. Kennedy, 39 N. Y., 245; State vs. Matrassey, 47 Mo., 295; Territory vs. Timmerman, 3 Washington Territory, 445.)

For that crime the law condemns the petitioner to suffer death, and does not authorize the court to imprison him in a penitentiary or to subject him to any other punishment except in an incidental way. The
11 power to commute the punishment for said crime to imprisonment is committed to the governor and is not vested in the courts of this State.

There is therefore no law giving color of authority to the superior court of King County to sentence the petitioner to be punished by imprisonment upon the verdict rendered by the jury in his case.

The several propositions above stated are not directly controverted by the Supreme Court in its opinion in this case. The only authority claimed for the disposition of the case made by its decision and judgment is found in § 1429 of Hill's Code, which provides that "The Supreme Court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had" (State vs. Freiderich, 29 Pacific Reporter, 1061). This law does not in terms nor by implication give any power not usually possessed by appellate tribunals. Power to modify a judgment or to direct a proper judgment is given, and power to order a new trial of a cause whereby the verdict of a jury may be annulled is given, but to the word "judgment" in this statute must be given its true legal and accurate definition. It does not stand as a synonym for the word "verdict." In the case of The Commonwealth v. Lockwood, 109 Mass., the opinion of the court, by Mr. Justice Gray, gives an admirable definition and shows the distinction between the terms "conviction" and "judgment." He says: "The ordinary legal meaning of 'conviction,' when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained." And the learned justice
12 then proceeds by a logical and profound argument, fortified by quotations from Blackstone, to prove the absolute truth and accuracy of this definition. The constitution of this State is radical in the provisions it contains designed to restrain the judges from attempting to influence juries in the decision of questions of fact. This should be taken into consideration in giving a construction to the statute and precludes the idea that the legislature could have intended to authorize the court to modify a verdict, even if the language used did not plainly limit the power of the

Supreme Court, so that its determination of the cause should only affect directly that part of the proceedings which, under a system of jurisprudence including jury trials, is properly within the control of the court.

These considerations lead me to the conclusion that the imprisonment of the petitioner is without due process of law and in violation of the fourteenth amendment of the Constitution of the United States. But on the other hand by his own showing the petitioner is presumably guilty of the intentional killing of a human being, with malice, the supreme court of the State being of the opinion that the verdict of the jury is to that extent sustained by the evidence, and by existing laws of this State he is subject to punishment therefor and not entitled to be set at liberty, nor to be by this court shielded from punishment. His imprisonment under the sentence passed upon him is no more unlawful than his discharge would be. Inasmuch as the petitioner has been regularly tried and sentenced in a court having complete jurisdiction of the crime and the prisoner, whose error is not proceeding regularly, in his case, under the general laws of the State can be corrected upon a review of the case in the Supreme Court of the United States by a writ of error without doing injustice to either the prisoner or the people, I do not consider that this court ought to
13 lean in his favor in the exercise of discretionary powers to the extent of delivering him from punishment for a crime whereof he has been legally indicted and not acquitted.

The industry of counsel has been productive of the presentation upon the argument of an array of authorities in which the principles and rules governing the case are set forth and expounded. I will not prolong this opinion to the extent necessary to review or comment upon them in detail. It is sufficient to say in general that the authorities cited in behalf of the petitioner fully sustain the proposition that any person whom within the territorial limits of the jurisdiction of the United States Government is deprived of liberty, either without color of legal authority, or because of an act done in the execution or attempted execution of a law of the United States, or by the execution of a pretended law which is contrary to the Constitution of the United States, or of a valid law which by application to his particular case becomes in its operation and effect in that instance violative of any Constitutional provision, or by an attempt to enforce a valid law by proceeding otherwise than according to constitutional and lawful methods may invoke the power of a national court to secure the equal protection of the laws; and his liberty, if he is not by the law of the land subject to further restraint. But no precedent has been cited for the discharge from the custody of State officers, of a person lawfully indicted under a valid law for a crime which is bad in itself, without an acquittal upon a lawful trial, when there appears to be a lawfully organized court having jurisdiction to try him and there is no impediment to a lawful trial and determination of the case other than informal and void proceedings of the court. In ex parte Medley 134, U. S. 160, the decision of the Supreme Court is to the effect that a convict in custody under a void judgment of a State court and entitled to be released therefrom should
14 not be set at liberty, if under any existing law of the State there could be further proceedings in his case. I am unable to agree with the petitioner's counsel in the opinion expressed that the petitioner will be unable to obtain a writ of error from the Supreme Court of the

United States. While it is true that the supreme court of the State has not as yet passed upon any Federal question in the case it may be required to do so. The supreme court of the State has already entertained two appeals in this case and has reversed the judgments against him given after two successive trials, and the law gives him the right to appeal to that court again and asks for a reversal of the judgment of which he now complains, on the identical grounds upon which he is in this court asking for a writ of habeas corpus. If the court on consideration of such appeal should adhere to the opinion which it has heretofore given, he will then be clearly entitled to a writ of error from the Supreme Court of the United States. Having that remedy it would not be right to grant him a writ of habeas corpus.

Ex parte Bigelow, 113 U. S., 28; ex parte Wood, 140 U. S., 278; ex parte Elrich, 43 Fed. Rep., 661.

The application for a writ is refused.

C. H. HANFORD,
Judge.

(Endorsed:) Filed August 9, 1892. A. Reeves Ayres, clerk; by R. M. Hopkins, deputy.

15 IN THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF WASHINGTON, NORTHERN DIVISION.

In the matter of the application of Albert Frederich for a writ of habeas corpus.

I.

Albert Frederich, above named, conceiving himself aggrieved by the order of said court in the above entitled proceeding of date August ninth, 1892, refusing to issue a writ of habeas corpus in his behalf to the warden of the penitentiary of said State and discharge him from unlawful imprisonment, doth hereby appeal from said order, to the Supreme Court of the United States and he prays that this appeal will be allowed, and that the transcript of the proceedings and papers upon which said order was made, duly authenticated may be sent to the Supreme Court of the United States.

TYLER & TYLER,
Attorneys for Appellant, Albert Frederich.

Dated Seattle, Washington, September 9th, 1892.

And now, to-wit, September 10th, 1892, it is ordered by the court that the appeal of Albert Frederich be allowed as prayed for and the clerk of this court prepare and send to the Supreme Court of the United States, a certified copy of the record, proceedings and papers in said cause.

C. H. HANFORD,
U. S. District Judge, presiding in the circuit court.

(Endorsed:) Filed Sept. 10, 1892, in the U. S. circuit court, A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

16 IN THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF WASHINGTON, NORTHERN DIVISION.

In the matter of the application of Albert Frederich for a writ of habeas corpus.

STATE OF WASHINGTON,
County of King, ss:

W. B. Tyler, being duly sworn deposes and says: That he is one of the attorneys for the petitioner in the matter above entitled. That the firm of Tyler & Tyler were appointed by the judge of the superior court of King County, State of Washington, to defend the said Frederich, for the reason that said Frederich had no money or property of any kind, and was not able to employ counsel. Affiant avers that the said Frederich is now confined in the penitentiary at Walla Walla and that he has no money or property of any kind, whatsoever, nor has he any means or method of obtaining the same.

W. B. TYLER.

Subscribed and sworn to before me this 9 day of September, 1892.
[SEAL.] W. F. HAYS,
Notary Public in and for the State of Washington,
Residing at Port Townsend.

17 IN THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF WASHINGTON, NORTHERN DIVISION.

In the matter of the application of Albert Frederich for a writ of habeas corpus.

Upon reading and considering the affidavit of W. B. Tyler, and it appearing that the petitioner, Albert Frederich, has no money or property whatsoever and no means of obtaining the same, it is ordered that the usual costs and fees for the appeal herein from the order and decree of this court refusing to issue a writ of habeas corpus herein, be remitted and *and* that the clerk of this court be ordered and that he is hereby ordered to transmit the record in this case as set forth in the notice of appeal herein to the Supreme Court of the United States.

C. H. HANFORD,
Judge.

(Endorsed:) Filed Sept. 10, 1892, in U. S. circuit court, A. Reeves Ayres, clerk. By R. M. Hopkins, deputy.

18 IN THE CIRCUIT COURT OF THE UNITED STATES, NINTH JUDICIAL CIRCUIT, NORTHERN DIVISION, DISTRICT OF WASHINGTON.

In the matter of the application of Albert Frederich for a writ of habeas corpus. No. 186.

I, A. Reeves Ayres, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of Washington, do hereby certify the foregoing seventeen written and printed pages,

numbered from one to seventeen, inclusive, to be a full, true, and correct copy of the record and of all the proceedings in the above and therein entitled matter, and that the same constitutes the transcript of the record upon appeal to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court, this 6th day of October, A. D. 1892.

[SEAL.] A. REEVES AYRES,
Clerk U. S. Circuit Court, District of Washington.
By R. M. HOPKINS,
Deputy Clerk.

19 Indorsed (on cover): Case No. 15275. Washington C. C. U. S. Term No., 1305. Ex parte. In the matter of Albert Frederich, appellant. Filed March 13, 1893. Supreme Court U. S. Clerk's office. Received Oct. 17, 1892.

O

149 U.S. 10

Office Supreme Court U. S.
FILED.
APR 10 1893
JAMES H. McKENNEY,
CLERK.

No. .....

IN THE SUPREME COURT

OF THE

UNITED STATES.

In the Matter of the Application of ALBERT FRIEDRICH *for a Writ of Habeas Corpus.*

Appeal from the Circuit Court of the District of Washington, Northern Division.

BRIEF FOR THE STATE OF WASHINGTON.

W. C. JONES,
Attorney General.

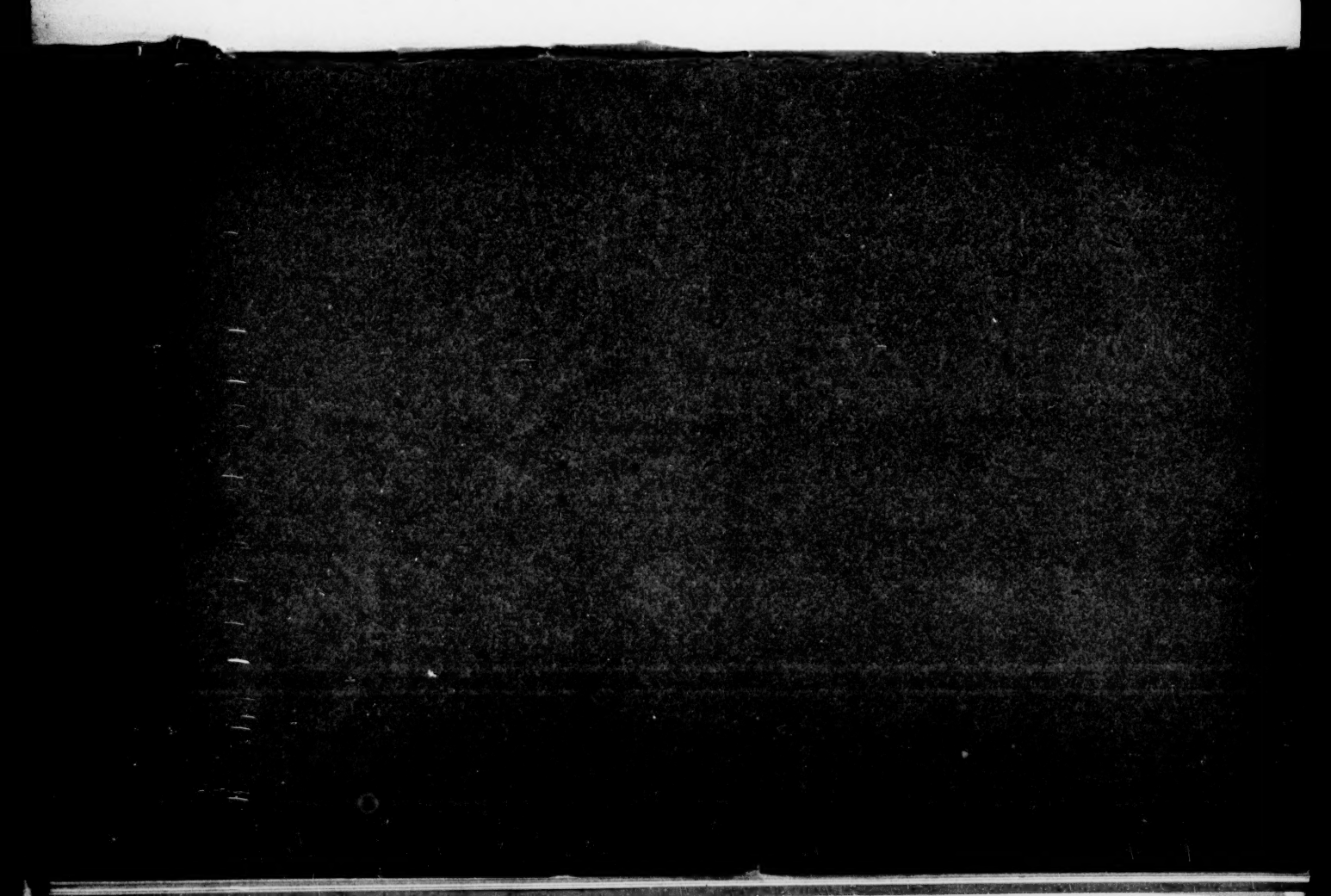
JAMES A. HAIGHT, *for the State.*

O. C. WHITE, . . . STATE PRINTER.

Filed this ..... *day of* ....., *189*....

.....

Clerk.



IN THE SUPREME COURT

OF THE

UNITED STATES.

In the Matter of the Application of ALBERT FRIEDRICH *for a Writ of Habeas Corpus.*

Appeal from the Circuit Court of the District of Washington, Northern Division.

BRIEF FOR THE STATE OF WASHINGTON.

W. C. JONES,
Attorney General.

JAMES A. HAIGHT, *for the State.*

OLYMPIA, WASH.:
O. C. WHITE, . . . STATE PRINTER.
1893.

STATEMENT OF THE CASE.

Albert Friedrich petitioned the circuit court for a writ of *habeas corpus* under the following statement of facts: A valid indictment, charging him with murder in the first degree, was found by a lawful grand jury, and duly presented to the superior court of the State of Washington for the county of King. After an arraignment and a plea of not guilty, he was upon said indictment tried in said court with the result that the jury brought in a verdict finding him "guilty as charged in the indictment." He was thereupon sentenced to suffer the legal penalty for said crime, which is death. Upon a review of his case the supreme court of the state considered the evidence of premeditation inadequate, and while recognizing that the matter was strictly within the province of the jury, yet in the furtherance of justice, and in view of the fact that murder in the first degree under the law of Washington differs from murder in the second degree only in the added element of premeditation, the supreme court exercising its statutory power to modify a judgment appealed from, ordered that said verdict stand and remanded the case to the superior court with instructions to enter a new judgment against the appellant adjudging him to be guilty of murder in the second degree, and to proceed thereon in accordance with law.

State v. Friedrich, 29 Pac. Rep. 1055; 4 Wash. 204, 222.

This judgment was given under the authority of section 1429 of Hill's Code, vol. 2, which provides as follows: "The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment, or order, to be entered, or direct a new trial or further proceedings to be had. The decision of the court shall be given in writing; and in giving its decision, if a new trial is granted, the court shall pass upon and determine all the questions of law involved in the case presented upon such appeal and necessary to the final determination of the case. Its judgment in appealed cases shall be remitted to the court from which the appeal was taken." In obedience to the above instructions the superior court did adjudge Friedrich to be guilty of murder in the second degree and sentenced him therefor to be punished by imprisonment at hard labor in the state penitentiary for a period of twenty years, and in pursuance of that sentence he is now incarcerated in said penitentiary.

In re Friedrich, 51 Fed. Reporter, 747.

Subsequently to the filing of said opinion of the supreme court Friedrich, by his attorney, petitioned for a re-argument, but in his petition did not claim that the judgment of the supreme court violated any provision of the federal constitution. This petition was duly considered by the court and denied.

State v. Friedrich, 4 Wash. 204, 226.

The petitioner claims that this judgment of the superior court and the judgment of the supreme court on which it is based is

not merely voidable but is manifestly void; that, therefore, his present imprisonment is without due process of law and in violation of the fourteenth amendment of the constitution of the United States.

The circuit court took the view that the supreme court of the State of Washington had misinterpreted section 1429 of Hill's Code, vol. 2, just quoted; that the action of the supreme court was, in effect, a modification of the verdict; that the supreme court had, under this statute, the power to modify a judgment only in so far as such modification did not involve a modification of the verdict; that, therefore, the judgment of the supreme court was void; that, therefore, the judgment of the superior court ordering the imprisonment of the petitioner was void; that, therefore, the incarceration of the petitioner is without authority of law, and that, therefore, upon a writ of *habeas corpus*, properly applied for, the prisoner is entitled to be discharged. The court, however, held that the petitioner should have applied for his writ in the first instance to the proper state court, having the right, in case the state court ignored the alleged violation of the rights secured to him by the federal constitution, to secure redress in the due course of proceeding by a writ of error from the supreme court of the United States.

In re Friedrich, 51 Fed. Rep. 747, 749, 751.

At the time the alleged offense of the appellant was committed the statutes of Washington defining murder in the first and second degrees were as follows:

Sec. 786, Code of 1881: "Every person who shall purposely

and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison or causing the same to be done, kill another, every such person shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death."

Sec. 790, Code of 1881: "Every person who shall purposely and maliciously, but without deliberation or premeditation, kill another, every such person shall be deemed guilty of murder in the second degree, and upon conviction thereof shall be imprisoned in the penitentiary for a term of not less than ten nor more than twenty years, and kept at hard labor."

The appellant has failed to serve the State of Washington with its assignment of errors, and the attorney general has been apprised of the day to which the hearing of this cause has been advanced by the supreme court on so short a notice that it is possible that this brief summary of his authorities may not reach the court within the time provided in the rules, but he respectfully submits it for the convenience of the court, in case the court cares to avail itself of it.

ARGUMENT.

I.

If appellant is right in his contention that the judgment of the supreme court of the State of Washington was void, and that it was the duty of the federal court to interpose in this proceeding, he is nevertheless not entitled to a discharge. It must be borne in mind that on his own theory of this case every proceeding in this cause was valid anterior to the entry of judgment by the supreme court of the State of Washington. That is the first proceeding alleged to be invalid. If that judgment was unwarranted by law, and therefore void, the prior proceedings being valid, the appeal of petitioner to the supreme court of the State of Washington is still pending and undetermined. During the pendency of this appeal, and until it is disposed of, the petitioner is, of course, not entitled to discharge from custody. The requirement of section 761 of the United States Revised Statutes that the prisoner shall be disposed of as law and justice require, would simply impose the duty on this court to remand the prisoner to the custody of the sheriff of King county, pending his appeal to the supreme court of the State of Washington.

In re Medley, 134 U. S. 160, 174.

Where "a person has been lawfully indicted under a valid law for a crime which is bad in itself, without an acquittal upon a lawful trial, when there appears to be a lawful organized court having jurisdiction to try him, and there is no impediment to a

lawful trial and determination of the case other than an informal and void proceeding of the court," the mere fact that a provision of the sentence, or judgment, violates a provision of the federal constitution does not entitle the defendant to a discharge by a federal court.

In re Medley, 134 U. S. 160, 174.

In re Friedrich, 51 Fed. Rep. 747, 750.

Appellant's imprisonment under the sentence passed upon him is no more unlawful than his discharge would be.

II.

(*a*) Conceding for the sake of the argument that the supreme court of the State of Washington, in executing its statutory authority to modify the judgment of the lower court, exceeded the bounds of that authority in certain particulars of its judgment, such error of the supreme court of the State of Washington, if it injuriously affected any right under the constitution and laws of the United States, is reviewable by writ of error from this court.

In re Friedrich, 51 Fed. Rep. 747, 751.

Upon the state courts, equally with the courts of the union rests the obligation to guard and enforce and protect every right granted, or secured, by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them.

Robb v. Connelly, 111 U. S. 624, 637.

The statute under which appellant claims to be aggrieved is not repugnant to the constitution of the United States; and

the supreme court of the State of Washington was competent to guard and enforce every right secured to him by that instrument. If the question of the validity of that provision of the judgment of the supreme court that instructed the lower court to enter a new judgment, adjudging the petitioner to be guilty of murder in the second degree, had been submitted to that tribunal, and that question had been erroneously decided against appellant, such error would not have made the judgment void, or the detention under it illegal, nor would that error of itself have authorized the circuit court of the United States, upon writ of *habeas corpus*, to review the decision or disturb the custody of the accused by the state authorities. The remedy for the accused in such a case was to sue out a writ of error from this court to the supreme court of the State of Washington, whose judgment, if adverse to him in respect to any right, privilege or immunity specially claimed under the constitution or laws of the United States, could have been re-examined and reversed, affirmed, or modified by this court as the law requires.

U. S. Revised Statutes, section 759.

In re Wood, 140 U. S. 278, 287.

(*b*) When the remedy by *habeas corpus* involves a conflict between an inferior federal court and the supreme court of the state, where they have concurrent jurisdiction, appeal to the highest court of the state and writ of error thereto from this court, is the proper remedy.

In re Wo Lee, 26 Fed. Rep. 471.

The constitution of the State of Washington provides, section 4, article 4: "The supreme court shall have original jurisdiction in *habeas corpus*." This provision of the constitution is self-executing and the fact that the language above quoted is part of a clause reading as follows: "The supreme court shall have original jurisdiction in *habeas corpus* and *quo warranto* and *mandamus* as to all state officers," does not restrict the jurisdiction of the supreme court to *habeas corpus* to *state officers* but the original jurisdiction of the supreme court in *habeas corpus* is held to extend to all cases.

In re Rafferty, 1 Wash. State, 382, 385.

(*c*) Where the state court has jurisdiction of the case and the subject-matter, but the constitutionality of the proceedings is drawn in question, the proper remedy is by appeal to the highest court of the state and writ of error thereto from this court.

Ex parte Ulrich, 43 Fed. 66.
In re Enslow, 45 Fed. 351.
Ex parte Bigelow, 13 U. S. 328.
Ex parte Harding, 120 U. S. 782.

In *Ex parte Ulrich* and *Ex parte Bigelow* it was held that an error that consisted in placing the accused twice in jeopardy by reason of the discharge of a jury, after it was impaneled and sworn to try the case, and the impaneling of a new jury and trial thereby, could not be reviewed on *habeas corpus*.

In *Ex parte Harding* it was held that an error consisted of a denial to the accused of his right to have compulsory process for obtaining witnesses in his favor could not be reviewed on a writ of *habeas corpus*.

In *In re Enslow* it was held that the question of the constitutionality of a proceeding wherein a person was arrested on a police warrant from one state judge and committed to jail after hearing before another judge acting within his general jurisdiction, could not be raised by *habeas corpus* in the federal court. The court says: "The state judge acted upon a matter within his jurisdiction and passed upon the construction of the state law and practice. Were I to review his action it would give to this proceeding the effect of a writ of error, which cannot be done."

In this case the supreme court of the State of Washington acted upon a matter within its jurisdiction and passed upon the construction of the state law and practice. For the circuit court to review the action of the supreme court of the State of Washington in this proceeding would give to the writ of *habeas corpus* the effect of a writ of error.

(*d*) Where the law is constitutional but the erroneous application of it violates the federal constitution, the question must be raised not by *habeas corpus* but by writ of error out of this court.

In re Wood, 140 U. S. 278, 289.

In this case not the statute of the State of Washington but

the alleged erroneous construction or application of it by the supreme court of the State of Washington, is claimed to be unconstitutional. The supreme court had jurisdiction to interpret the state statute authorizing it to modify judgments of the lower court and also jurisdiction to apply the statute as it construed it. If that court misinterpreted the statute so as to transgress the rights possessed by the petitioner under the federal constitution and laws, it made an error in the exercise of its jurisdiction, and this error could be corrected by writ of error from this court; but the error did not make its action illegal and void and subject to be set aside by any court happening to have jurisdiction in *habeas corpus*.

(*e*) Where there is no reason to presume that the state court will not preserve to complainant the rights secured to him by the federal constitution, the remedy is not by *habeas corpus*, but by appeal to the highest court of the state, and writ of error thereto from this court.

Ex parte Royal, 117 U. S. 241, 252.
Ex parte Fonda, 117 U. S. 516.

The circuit court was not at liberty to presume that the decision of the state court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court.

The petition suggests no reason why the supreme court of the State of Washington could not have been applied to to re-

view its own judgment, or to review the judgment of the county of King entered pursuant to its own instructions.

It was not intended by congress that federal courts should, by the remedy of *habeas corpus*, obstruct the administration of the criminal laws of a state.

Ex parte Royal, 117 U. S. 241.

And after final disposition of the case in the state supreme court the circuit court may well put the party to his writ of error, rather than interfere by writ of *habeas corpus*.

In re Wood, 140 U. S. 278.

III.

Conceding that the provision of the judgment of the supreme court that is complained of was erroneous, and that the error constituted a want of "due process of law," the error was one of procedure and the incarceration of the prisoner was not "in violation of the constitution of the United States," to use the language of U. S. Revised Statutes, 753, unless the constitutional right was asserted as such at the time of its alleged violation and was expressly denied by the court.

Ex parte Wood, 140 U. S. 278.

Spies v. Illinois, 123 U. S. 131.

The alleged want of due process of law in this case is not that the appellant is suffering imprisonment on conviction of an act that is not a crime, or on conviction of an act that the

state attempted to make a crime by an unconstitutional law, or on conviction the second time for the same offense. The only want of due process of law alleged is that the court has in effect modified a verdict so as to reduce the penalty to be inflicted on the party under conviction.

Surely if there ever was a question of mere procedure this is such a question.

But this court has repeatedly held that constitutional rights pertaining to procedure guaranteed by the federal constitution, cannot be enforced through the writ of *habeas corpus*. In the last analysis must not these cases rest on the doctrine that while the violations of such rights were errors which entitled the accused to whatever relief the courts could administer, yet they did not render the subsequent incarceration of the accused a being in custody "in violation of the constitution of the United States," unless the constitutional right was expressly asserted and expressly denied at the time the alleged error was committed or during the period thereafter in which an opportunity was given for the assertion of such right? Constitutional rights of procedure must be asserted in order to render the sentence void.

IV.

Conceding that the supreme court of the State of Washington erroneously interpreted the statute of that state in holding that section 1429 of Hill's Code, vol. 2, giving it power to modify judgments of the lower court, imparted to it power to direct a sentence for murder in the second degree when the verdict

had been one of guilty of murder in the first degree, the error of misinterpreting the state statute is reviewable by the federal courts neither in this nor in any other proceeding.

(*a*) A decision of a state court erroneous in that it violates a statute of the state is not want of "due process of law."

Arrowsmith v. Harmoning, 118 U. S. 194.

In this case a sale by a guardian under an order of court requiring no bond was upheld as valid though the statute required the giving of a bond.

Where jurisdiction has been acquired, errors in administering a constitutional law not involving jurisdiction of the subject or the parties cannot be re-examined in this court.

Lent v. Tileson, 140 U. S. 316, 331.

The national courts have no power to relieve a citizen from injustice resulting from maladministration of state laws, or from the errors of state courts.

Ex parte Humason, 46 Fed. Rep. 388, 392.

The federal courts cannot interfere by *habeas corpus* with a judgment of a state court on the ground that the statute authorizing the judgment violates the state constitution.

In re Brosnahan, J., 18 Fed. Rep. 62, 68.

Ex parte Kinney, 3 Hughes, 9.

A conviction by a state judge *de facto* but not *de jure*, the supreme court of the state approving, will not be disturbed.

In re Ah Lee, 6 Sawy. 410.

"The act in question may be in conflict with the constitution of the state, without violating the constitution or any law or treaty of the United States. It may be in excess of the powers which the people of Missouri have conferred on their legislative body, and therefore void without infringing any principle found in the constitution, laws or treaties of the United States."

MILLER, J., in *In re Brosnahan*, 18 Fed. Rep. 62, 68.

The decision of the state court sustaining the validity of an act under the state constitution is not re-examinable in the federal courts.

In re Kemmler, 136 U. S. 436, 447.

Walker v. Sauvinet, 92 U. S. 90.

The federal constitution does not restrain a state or any of its departments from violating its own constitution.

MILLER, J., in *Davidson v. New Orleans*, 96 U. S. 97, 105.

This court cannot entertain an attack on the jurisdiction of the state supreme court where the basis of the attack is an alleged violation of the constitution and laws of the state. It is no function of the federal government to see that the state makes its laws conform to its own constitution or that its agencies enforce its laws. The function of the states in our form of government may be a humble one relatively to that of the federal government, but they are by no means wards of the nation, to be paternally guided and controlled by the nation into obedience of those self-imposed regulations which they have had enough autonomy to choose and adopt.

(*b*) It is the function of the highest judicial tribunal of a state to determine the common law and to interpret the statutes and constitution of that state. A statute of a state is what the highest court of that state construes it to mean — determines it to be. Such construction is, of course, binding on this court.

In this case the supreme court of the State of Washington construed the statute in question to give it the power exercised by it in rendering the judgment.

State v. Friedrich, 4 Wash. 204, 222.

That construction determined what the statute really is, and this court cannot alter the statute as so determined to something else. The ingenious criticism by the learned judge of the circuit court of the construction given to the statute by the supreme court of Washington, may be sound logic; his conclusion that its construction of that statute was not the law of the State of Washington, was itself, it is respectfully submitted, not law.

V.

The appellant contended in the circuit court that the judgment by the supreme court of Washington, reversing the judgment of the superior court of King county, directing the entry of another judgment, was not an exercise of appellate power, and therefore the action thereon was without "due process of law."

On reason, the power of an appellate court to modify a judgment of a lower court, implies the power to direct the entry by

x The following authorities show that the criticism of the circuit court was unwarranted:

Arrington v. State (Ark) 19 S.W. R. 996
Field v. State 70 Ga. 196
Hagan v. State 30 Wis. 438
Johnson v. Commonwealth 34 Pa. St. 386

the lower court of the proper modification or of the judgment as modified, and this power implies the power of the appellate court to direct the lower court to make the modification.

As a matter of authority it is now generally provided by statute, and in some states it is a rule of the common law, that the appellate court has the power to make a new sentence or direct the proper sentence to be entered.

1 Bishop Criminal Procedure, § 1373.
Wharton Criminal Pleading, § 780.
Ratzky v. People, 29 N. Y. 124.
McKee v. People, 32 N. Y. 239.
Harris v. People, 59 N. Y. 599.
Jacquis v. Commonwealth, 9 Cush. 279.
Territory v. Conrad, 46 Northwestern Reporter, 605 (Dak.).
Harris v. People, 130 Ill. 457.
State v. McCormick, 27 Iowa, 402, 414.
Wilson v. People, 25 Mich. 410.

In Washington the supreme court has repeatedly exercised this power.

Where an indictment was drawn with the purpose to charge assault with intent to commit murder, but failed to charge more than a simple assault, the case was remanded with instructions to the court below to sentence the defendant as upon conviction of a simple assault.

Watson v. State, 2 Wash. 504.

So in an indictment intended to charge murder and only sufficient to charge manslaughter the case will be remanded with instructions to pass sentence on the defendant for manslaughter.

Blanton v. State, 1 Wash. 265.

State v. So Ho Ge, 1 Wash. 275.

State v. So Ho Me, 1 Wash. 276.

The power being one generally recognized it must have been intended to be included in the phrase "due process of law" when it was incorporated into the constitution.

Murray's Lessee v. Hoboken, etc., Co., 18 How. 272.

Davidson v. New Orleans, 96 U. S. 97.

The extent to which states may go in providing for the reversal or modification of judgments without transgressing "due process of law" is illustrated in *Freeland v. Williams*, 131 U. S. 405, where a statute authorizing a bill in equity to invalidate a judgment obtained against the plaintiff for a tort committed under military authority in accordance with the usages of civilized warfare and as an act of public war, and also to enjoin its enforcement, was held not to be invalid as violating "due process of law."

In this case Miller, J., used the following language giving the state the widest latitude in this particular: "Judgments, however solemn, however high the court that rendered them, and however conclusive in a general way between the parties, have been subject to review, to reconsideration, to reversal and to

modification by various modes. Among these are motions for new trials, appeals, writs of error and bills of review, and these have always been held to be due process of law. So, also, judgments of courts of law have been subject to be set aside, to be corrected and the execution of them enjoined by bills in chancery under circumstances appropriate to such relief. This, also, must be held to be due process of law." It would seem then that the method taken by the supreme court to exercise its appellate jurisdiction and to modify the judgment was "due process of law."

VI.

The appellant contended that the modification of the judgment was in effect a modification of the verdict, and that for this reason there was a want of "due process of law."

The provision for "due process of law" requires an adherence to the fundamental principles of fair and impartial trials and equal justice to all; not an immutable preservation of the customary institutions through which those principles have been observed.

Davidson v. New Orleans, 96 U. S. 97.
Hurtado v. Cal., 110 U. S. 516.
In re Kemmler, 136 U. S. 436.

A fortiori, it does not forbid a change in procedure that deprives a citizen of any advantage not due to the merits of his cause, or that still permits him to receive the full benefit of the merits of his cause.

Even as to a criminal cause pending before their enactment, laws are valid and not *ex post facto* that preclude a defendant from taking advantage of variances not prejudicial to him.

Commonwealth v. Hall, 97 Mass. 570.
Lasure v. State, 19 Ohio Stat. 43.

Or that reduce the number of the prisoner's peremptory challenges.

Dowling v. State, 13 Miss 664.

Or that modify, simplify and reduce the essential allegations of an indictment.

State v. Learned, 47 Me. 426.
State v. Corson, 59 Me. 137.

Or that permit a supreme court on appeal to direct the entry of the proper judgment by a trial court that has rendered a judgment not authorized by law.

Ratzky v. People, 29 N. Y. 124.
McKee v. People, 32 N. Y. 239.

The alleged modification of the verdict deprived the appellant of no substantial right. The jury in finding him guilty of murder in the first degree had necessarily found him guilty of all the elements of murder in the second degree. The determination of the supreme court that the additional element of premeditation, the essential necessary to raise that offense to murder in

the first degree, was wanting did not require as a matter of *substantial right* to the accused that there should be a new investigation by a jury regarding the elements of murder in the second degree which the jury had found to have existed by a determination in which as to those particulars the supreme court could find no flaw.

In the nature of things a rule that permits the accused to be sentenced for manslaughter on a conviction of murder is no more wanting in the elements of "due process of law" than the rule that permits a jury to find a defendant guilty of manslaughter on an indictment for murder, or the rule that permits a court to sentence the accused for manslaughter on an indictment intended to charge murder, but charging with proper sufficiency only the offence of manslaughter.

When it is borne in mind that it is not deemed contrary to "due process of law" to impose on the accused the hardship of the exception to the presumption of innocence that the burden of proof of insanity is on defendant; as is the rule in some states;

Cooley Const. Lim. (6th ed.), p. 375.

of being tried without indictment by a grand jury;

Hurtado v. Cal., 110 U. S. 516.
Kalloch v. Sup. Ct., 56 Cal. 229.
State v. Boswell, 104 Ind. 541.

of being convicted of keeping a place in which it is reputed that intoxicating liquors are kept for sale;

State v. Thomas, 47 Conn. 546.

of being subjected to the reading of depositions against him, if they are allowed to be read for him;

Butler v. State, 97 Ind. 378.

and of being arrested of a crime after being kidnapped from another state to which he has fled;

Mahon v. Justice, 127 U. S. 700.

and when it is further considered that the common law from which we derive our conception of "due process of law" tolerated such rules as those forbidding the accused to testify in his own behalf or to receive the aid of counsel, can it be deemed that the alleged modification of the verdict in this case that admittedly deprived the defendant of no substantial right, that relieved him of all the harm that the sole error in the case did him, that deprived him of a re-trial only as to matters that were free from error, was such a departure from the fundamental principles of fair and impartial trials that it must be held to be *not* due process of law?

VII.

Conceding that the modification of the judgment was in reality a modification of the verdict, and more than that was a usurpation of the function of the jury, it was still due process of law.

"Due process of law" does not require a jury trial in criminal causes, and as the greater includes the less, if the total absence of jury trial is consistent with "due process of law," a partial transfer of the function of the jury to the court is likewise consistent with it.

(*a*) The guaranty of "due process of law" occurs in the fifth amendment to the federal constitution. The sixth amendment, adoped at the same time, contains the guaranty of jury trial in criminal causes. This court has repeatedly held that none of these clauses are superfluous, and that the phrase "due process of law," as used in the fifth amendment, does not include other matter specifically set forth in that article, and the phrase means no more in the fourteenth amendment than in fifth.

MATTHEWS, J., in *Hurtardo v. California*, 110 U. S. 516, 534.

Approved by FULLER, C. J.

In re Kemmler, 136 U. S. 436, 448.

By a parity of reasoning it does not include the matter specifically set forth in the sixth amendment adopted at the same time, and since it means the same in the fourteenth amendment as in the fifth, it does not include jury trial in criminal causes.

(*b*) "Due process of law" means in the fourteenth amendment the law deriving "its authority from the inherent and reserved rights of the states, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." These limits in a word are freedom from arbitrary deprivation of life, liberty or property, and equal protection of the laws for all.

FULLER, C. J. *in re Kemmler*, 136 U. S. 436, 448.

A trial by a state court pursuant to its statutes of a cause

triable at common law by a jury does not violate fourteenth amendment.

Walker v. Sauvinet, 92 U. S. 90.

The fourteenth amendment does not prevent a state from giving a court of equity power to hear a suit brought by the holder of an equitable right in land to establish the same against the holder of the legal title;

Church v. Kelsey, 121 U. S. 252.

Nor for providing a speedy trial of cases involving title to office without trial by jury, provided orderly proceedings for a fair hearing are allowed.

Kennard v. Louisiana, 92 U. S. 480.

A seizure and sale of the property of an officer, holding moneys of the United States and not refunding them, by a marshal of the United States under a distress warrant issued by the solicitor of the treasury, under act of congress, May 20, 1820, does not deprive the party of his property without "due process of law."

Murray's Lessee v. Hoboken Land and Imp. Co., 18 How. 272.

Legislation is not open to the charge of depriving one of his rights without due process of law if it be general in its operation upon the subjects to which it relates and is enforceable in the usual modes established in the administration of govern-

ment with respect to kindred matter; that is by process on proceedings adapted to the nature of the case.

Dent v. West Virginia, 129 U. S. 114.

The federal constitution makes it possible for states to enter the union bringing with them an endless variety of institutions and methods of securing the rights of citizens. The only restrictions that the federal constitution imposes on their institutions is that they shall be republican in form. The only restriction that the federal constitution imposes on their methods of securing the rights of citizens is that rights shall be secured and sanctions imposed only after a fair and impartial trial under conditions that secure equal rights to all. Manifestly this can be done without a jury, as our centuries of trial of courts of equity and the experience of the majority of the civilized states of Europe from the earliest time with the civil law show.

It is respectfully submitted that the judgment of the supreme court of Washington, whether it is to be deemed a modification of a judgment, a modification of a verdict or a usurpation of a jury function, is nevertheless "due process of law;" that if the supreme court of Washington misinterpreted the statute of Washington, such error was not a violation of due process of law; that if the judgment as made was not "due process of law," the appellant is not in custody in violation of the federal constitution, since the error was one of procedure not seasonably objected to, and therefore the writ does not lie, and that even if it were otherwise a proper case for the writ, the avoid-

ance of the judgment of the supreme court of Washington leaves the appeal pending and the appellant in custody awaiting the determination of the appeal.

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